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NO. 83-297

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

ARMCO, INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.
State Tax Commissioner of West Virginia

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

Of Counsel

CHAUNCEY H. BROWNING
Attorney General

Jack C. McCLUNG
Deputy Attorney General
State Capitol
Charleston, West Virginia 25305

ROBERT DIGGES, JR.
Assistant Attorney General
Charleston, West Virginia 25305
(304) 348-2522
Counsel for Appellee David C. Hardesty

QUESTIONS PRESENTED

The appellee respectfully disagrees with the appellant's presentation of the questions raised by the Jurisdictional Statement and feels the following more fairly represents the questions presented for review:

1. Whether sufficient nexus exists with regard to appellant's sales to West Virginia customers to allow West Virginia, consistent with Due Process Clause and Commerce Clause requirements, to impose its business and occupation privilege tax on appellant's in-State selling activities.

2. Whether the principles of the unitary business concept are appropriate in determining whether a corporation has entered a State in such a fashion that nexus with regard to any one of its activities may be determined based upon the local character it has assumed through its overall in-State operations.

3. Whether the imposition of the West Virginia business and occupation tax upon appellant's business activity of making wholesale sales in West Virginia discriminates against interstate commerce.

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The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that it is manifest that this appeal does not present a substantial federal question, that the

judgment below clearly rests on an adequate nonfederal basis, and on other grounds which the appellee will present herein which establish that this Court should not set this case for argument.

OPINIONS BELOW

The opinion below by Justice Miller of the Supreme Court of Appeals of West Virginia is reported as Armco, Inc. v. Hardesty, __ W.Va. __, 303 S.E.2d 706 (1983). A copy of the opinion below is set out in full in the Appendix, appended to appellant's Jurisdictional Statement.

The December 30, 1980, memorandum opinion of the Circuit Court of Kanawha County, West Virginia, and the Kanawha County Circuit Court's judgment of July 20, 1982, are set out in full in

the Appendix, appended to appellant's Jurisdictional Statement.

JURISDICTION

The proceeding below began with an assessment of tax under the West Virginia business and occupation tax, Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. The assessment was upheld by the Tax Commissioner of the State of West Virginia upon evidence taken at an administrative hearing. Upon timely appeal to the Circuit Court of Kanawha County, the Tax Commissioner's decision was reversed and the assessment was expunged. The Circuit Court's decision was reversed by the Supreme Court of Appeals of West Virginia, and judgment was entered in favor of the appellee.

The judgment of the Supreme Court sought to be reviewed was entered on May 25, 1983. The appellant filed a Notice of Appeal to this Court with the Supreme Court of Appeals of West Virginia on August 19, 1983.

The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. amend. XIV, § 1.

The relevant portions of the Commerce Clause of the Constitution, as found in Article I, Section 8, provide as follows:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> "To borrow Money on the credit of the United States;
>
> "To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." U. S. Const., art. I, § 8.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 1, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2, which is set out in full in Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2a, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2b, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2c, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Armco, Inc., is an Ohio corporation qualified to hold property and do business as a foreign corporation in the State of West Virginia. During the period in question, January 1, 1970, through December 31, 1975, Armco carried on extensive business activities in West Virginia resulting in its payment of tax under the following business and occupation tax classifications: coal production (Chapter 11, Article 13, Section 2a, of the West Virginia Code of 1931, as amended); retail sales (Code 11-13-2c); wholesale sales (Code 11-13-2c); contracting (Code 11-13-2c); and furnishing property for hire (Code 11-13-2i). Armco acknowledged its in-State presence and taxability in the above areas but objected to the imposition of tax on wholesale sales made to West Virginia customers by certain of

its internal divisions. Armco contended that the operations of those divisions when viewed separately from its total in-State business did not have sufficient nexus with West Virginia.

Armco divides its organization into operating groups or divisions. Among those groups, separate manufacturing divisions are responsible for the marketing and sale of that division's products. Three manufacturing divisions made the wholesale sales at issue to West Virginia customers during the period involved. The divisions are: Steel Group; Union Wire Rope; and Metal Products.

The Steel Group manufactures practically all steel mill products with emphasis on high quality steels for specific needs. None of the Steel Group's

manufacturing facilities are located in West Virginia. The Steel Group has district sales offices in Cincinnati, Ohio, and Pittsburgh, Pennsylvania, that have responsibility for territories which include portions of West Virginia. During the audit period appellant's Steel Group Division employed four salesmen who solicited business within West Virginia. Such salesmen entered this State as often as twice a month to consult with clients concerning products available from appellant and possible future needs. Though not normal business procedure, such salesmen at times received orders from in-State customers on behalf of Armco. After a customer's order was filled, Armco's sales representatives made follow-up calls to check customer satisfaction with the quality

of the products sold and to solicit future orders. In addition, occasionally representatives of the Steel Group were called upon to investigate client complaints and perform service work within West Virginia.

The Union Wire Rope Division produces wire rope slings and accessories at its mill facilities in Kansas City. Wire Rope has three salesmen having responsibilities in West Virginia. Those salesmen are associated with Wire Rope's offices in Ashland, Kentucky, Pittsburgh, Pennsylvania, and Greensboro, North Carolina, and made one or two trips a month to West Virginia to consult with customers.

The Metal Products Division produces and sells construction products,

corrugated metal pipe, retaining wall, guard rail, plastic sewer pipe, floodgates, buildings, and so forth. Said division maintains office facilities at South Charleston, West Virginia, from which its employees solicit sales from customers throughout West Virginia. The South Charleston office has responsibility for selling all of the Metal Products Division's products except metal buildings. Armco created a separate department within the Metal Products Division through which the sale of metal buildings are handled in cooperation with franchise agents. The franchise agents are West Virginia residents operating businesses in this State. Armco allows said agents to whom it makes wholesale sales to display its corporate name and trademark at their place of

business and in advertisements. Additionally, Armco shares advertising expenses with its agents to promote sales to ultimate customers.

All sales by any of Armco's divisions are subject to acceptance at Armco's home office at Middletown, Ohio. Goods are generally shipped to West Virginia customers by common carrier, truck or rail. Title to such goods under Armco's conditions of sale passes to the customer upon delivery to the carrier at the point of shipment.

Assessment was made against Armco in 1977 for business and occupation taxes for the years 1970 through 1975 based on its total wholesale sales made to West Virginia customers. Such assessment was affirmed, less penalty, by the West Virginia State Tax Commissioner

in his administrative decision issued December 10, 1977. Armco appealed the Tax Commissioner's administrative decision to the Circuit Court of Kanawha County where the decision was overruled and the assessment vacated.

The Kanawha County Circuit Court found there was insufficient nexus to support the business and occupation tax assessed. Such decision was based upon the court's finding that Armco's in-State selling activities did not constitute a substantial enough nexus. The Court further held that the nexus required must be between the state and the activity or transaction in question and not merely between the state and other business activities of the taxpayer.

The West Virginia State Tax Commissioner appealed the Kanawha County

Circuit Court's decision to the Supreme Court of West Virginia. In an opinion issued May 25, 1983, the West Virginia Supreme Court reversed the Circuit Court and found there was sufficient nexus to support the taxation of the sales at issue. Such decision was based upon the Court's finding that Armco was a unitary business corporation conducting its business activity under one corporate umbrella. As a unitary business the Court concluded that the question of nexus must be resolved by examination of the full scope of Armco's in-State business operations and not by separate inquiry into each of its transactions.

ARGUMENT

I.

WEST VIRGINIA'S TAXATION OF APPELLANT'S IN-STATE SELLING

ACTIVITIES IS CONSISTENT WITH NEXUS REQUIREMENTS GOVERNING THE PERMISSIBLE TAXATION OF INTERSTATE BUSINESS.

Since the first two questions presented for review are closely interrelated, the appellee will consolidate its argument into a single presentation.

Chapter 11, Article 13, Sections 2 and 2c, of the West Virginia Code of 1931, as amended, jointly levy a privilege tax on sellers of property and provide that the said business and occupation tax is to be imposed, "upon every person engaging or continuing within this State in the business of selling any tangible property". Appellant's selling activities in West Virginia with regard to the sales of the products at issue are a matter of record and clearly constitute engaging in the business of selling.

Appellant does not deny its presence in West Virginia but alleges that its in-State selling activities are insufficient to supply the nexus necessary to permit their constitutional taxation. Appellant further contends that its other in-State business operations are not relevant to the nexus question relating to its sales activities.

The West Virginia Supreme Court of Appeal's decision determined that in addition to the business activities strictly associated with the sales at issue the sufficiency of nexus must be determined in light of a corporation's total in-State activities. The lower Court's decision in this case refused to examine appellant's sales activities in isolation from its total West Virginia business operation. The West Virginia

Supreme Court, recognizing a long line of precedent established by this Court, reviewed the nexus issue in terms of the full scope of appellant's in-State business activities. The lower Court observed that the principles of the unitary business concept were appropriate in reviewing the nexus question in this case.

One of the first cases dealing with the taxation of interstate commerce decided pursuant to nexus standards was Norton Co. v. Department of Revenue of the State of Illinois, 340 U.S. 534 (1951). In that case the State of Illinois attempted to tax interstate sales made by Norton Company to Illinois residents. The Court determined that when such sales involved orders sent directly to Norton's out-of-state headquarters by the Illinois customer and shipped

directly to the customer from said headquarters, there was no local incident upon which to base the tax. The Court did not consider whether Norton's other Illinois business activities contributed to the sales in question and thus provided the connection required by the Due Process Clause and Commerce Clause.

Justice Clark's dissent in Norton Co. supra, recognized that the multitudinous activities of a corporation in a state can give that corporation a local character which in a very real sense contributes to all of its operations in the state. The dissent concluded that when a corporation has undertaken in-state business activities of such magnitude that it has assumed a hometown label and received the manifold advantages

of such label, nexus is supplied by the operation of the business as a whole. Justice Clark's recognition of the fact that each aspect of a business contributes to all other aspects was an application of the unitary business concept.

The next significant case addressing nexus requirements was General Motors Corp. v. Washington, 377 U.S. 436, (1964). In that case General Motors contested the taxation of sales of automobiles, parts, and accessories shipped from out of state to in-state dealers on their direct orders. Although the factual situation was quite similar to Norton, supra, the Court in General Motors adopted Justice Clark's position that the local incident necessary to sustain the tax was provided by

General Motors business activities within the State as a whole. the Court stated:

> "Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does General Motors, and take advantage of its gain on domesticity, and still maintain that same degree of immunity."
> 377 U. S. at 448.

Justice Goldberg's dissent in General Motors supra, recognized that the majority's opinion was a departure from Norton, supra, in that the transaction at issue was no longer considered separately from the corporation's total in-state business.

Shortly after the General Motors decision, the Court again considered

nexus requirements in American Oil Co. v. Neill, 380 U.S. 451. (1965). Appellant contends that the American Oil decision represented an affirmation by the Court of the transactional nexus approach of Norton Co., supra, and a qualification of the General Motors, supra, unitary concept. Appellee submits that examination of the case reveals the contrary.

In American Oil the State of Idaho attempted to tax a sale of gasoline which occurred wholly in the State of Utah. The facts of the case clearly demonstrated that every phase of the sales transaction, from the initial negotiations to the completed delivery, occurred outside of Idaho. The Court concluded that there was simply no in-state activity connected with the out-of-state sales transactions upon which

to base the tax. The Court further held that the local incident or minimum connection necessary, unlike in General Motors, supra, was not provided by the taxpayer's other in-state operations. The Court found that there was no indication that the taxpayers other activities in Idaho contributed to the procurement or performance of the taxable event.

Rather than a qualification or deviation from the due process nexus rationale developed in General Motors, the American Oil, supra, decision simply represents an application of General Motors. A corporation's in-state business activities which lend to it a local character with its attendant goodwill certainly contribute to the success of its other less local in-state business activities. However, where the entire

activity sought to be taxed is completely outside the taxing state, such as American Oil's sales at issue, the local presence established by the corporation cannot be said to have contributed to the sale.

The American Oil, supra, decision did not alter the unitary business approach to the nexus questions enunciated in General Motors, supra,. The factual circumstances developed in American Oil clearly did not establish any in-state activity, associated with the sales in question, which could be regarded as a part of the corporation's unified in-state business operations. The unitary concept was simply inapplicable to that case.

In a recent series of cases, the vitality of the unitary approach to the question of the interrelationship of a

corporation's business activities was clearly demonstrated. In addressing the question of what aspects of a corporation's total income may be subject to a state's apportioned tax, this Court made use of the unitary business concept. The holding in such cases is less important to this case than the underlying reasons the unitary approach was utilized.

In Justice O'Conner's dissent in Asarco Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103 (1982), it is noted that the unitary business principle was designed to solve the insoluble problem of dividing businesses. This Court has consistently recognized that it is impossible to precisely determine to what degree one portion of a business aids another and how much the integration of

the business adds to the profitability of each of its parts. This Court in Mobile Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980) observed that the factors of profitability arise from the operation of a business as a whole and that it is misleading to characterize the income of the business as having a single identifiable source. The recognition by this Court that every aspect of a unified business contributes to all other aspects is a logical corollary to Justice Clark's proposition that a corporation's bundle of in-state corporate activity provides it a local character which is most helpful in all its in-state operations.

In Container Corp. of America v. Franchise Tax Board, 103 S. Ct. 2933

(1983), this Court analyzed the unitary business concept as follows:

> "A final point that needs to be made about the unitary business concept is that it is not, so to speak, unitary: there are variations on the theme, and any number of them are logically consistent with the underlying principles motivating the approach.
> * * *" 103 S. Ct. at 2941

It is plain that the unitary business concept has application to a number of tax issues which require analysis of the interrelationship of a business' various facets. This Court in Asarco, supra, acknowledged that the unitary principle had been a familiar concept in tax cases for more than sixty (60) years.

The West Virginia Supreme Court's determination that appellant's in-State selling activities were a part of its unitary business operation was clearly

correct. Appellant, in fact, has never submitted that its selling activities were not a part of its unified business. The Supreme Court's utilization of the unitary concept in the instant case is consistent with this Court's own use of such concept and is not in conflict with the disassociation principle of Norton Co., supra.

In Standard Pressed Steel Co. v. Washington Department of Revenue, 419 U.S. 560 (1979), this Court in discussing Norton Co., noted that the division in the Court in that case was not over the case's governing principle but rather over "the burden of showing a nexus between the local office and interstate sales - whether a nexus could be assumed and whether the taxpayer had carried the burden of establishing its immunity."

In other words, the Court agreed that if a transaction was completely disassociated from a corporation's other in-state activity and totally interstate in nature it was not taxable. The relevant question was however what constituted such a disassociation.

General Motors, supra, adopting a form of the unitary concept, held that the required disassociation was not present when the taxpayer's other in-state activities provided it a domestic character which contributed to its interstate business. In Mobile Oil, supra, and then in Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980), this Court addressed the principles of the unitary business concept and held that for an activity to be disassociated from the taxpayer's other business the

business activity at issue must constitute a discrete business enterprise. Application ot the unitary concept in Exxon Corp., clearly established that the mere operation of a corporation on a divisional basis does not establish a disassociation between the divisions.

In the present case, appellant has not established any of the requirements enunciated in Norton Co., supra, which would establish its local sales as immune from state taxation. First, appellant's sales activities are not purely interstate in nature. Such sales have definite intrastate aspects which in fact form the subject of the tax levied. Secondly, appellant's sales to West Virginia customers are not disassociated from its overall in-State presence. Regardless appellant's internal division of its operation, it is clear that

each part of its unified business contributes to all other parts.

The disassociation principle in Norton Co. has been defined by subsequent cases as requiring that the disassociation be to such a degree that the activity in question is not contributed to by the corporation's unified in-state operations. Where a corporation's maze of activity lends to it the character of a local merchant, such disassociation is extremely difficult to establish. The burden is on the taxpayer to prove that its activity in question is a discrete business enterprise, totally separate from its unitary business operation. The West Virginia Supreme Court's finding that Armco's sales to local customers were taxable as a part of a unified West Virginia business operation was not in conflict with the general principle

of Norton Co., supra, nor an improper application of the unitary business concept.

II.

THE IMPOSITION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES IN WEST VIRGINIA DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

In its Jurisdictional Statement, appellant asserts that the tax in question discriminates against interstate commerce. The alleged basis of discrimination is the interplay between Sections 2, 2b, and 2c, of Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. Specifically, the fifth paragraph of Code 11-13-2 provides that a person subject to the manufacturing privilege tax provided by Code

11-13-2b is not also subject to the wholesale sales business tax provided by Code 11-13-2c. Appellant contends that since an out-of-State manufacturer has to pay the wholesale sales tax under Code 11-13-2c, while the in-State manufacturer does not, this is discrimination against interstate commerce that violates the Commerce Clause. Appellee submits that the tax in question is not discriminatory in this manner.

First, the standard announced by this Court in determining if a state tax violates the Commerce Clause for being discriminatory is: "No state may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce * * * by providing a

direct commercial advantage to local business.'" Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977). Further, when determining whether a state tax is discriminatory, the tax must be assessed in light of its actual effect and considered in conjunction with other provisions of a state's taxation scheme. Maryland v. Louisiana, 451 U.S. 725 (1981). This principle was succinctly stated in Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963), as follows: "proper analysis must take 'the whole scheme of taxation into account,'" and "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions."

Accordingly, the fact that a manufacturer subject to the West Virginia

business and occupation tax on manufacturing (Code 11-13-2b) is not subject to the tax on wholesale sales does not amount to discrimination against interstate commerce. A West Virginia manufacturer is exempt from the wholesale sales tax, imposed at the rate of .27 percent, only if he has paid the tax on manufacturing at the rather substantial rate of .88 percent. Given these different tax rates, it cannot be said that an in-State manufacturer who sells its product in West Virginia is going untaxed while an out-of-State manufacturer is carrying an unfair share of the tax burden. The Legislature saw fit to tax manufacturing at a higher rate and then allow the manufacturer to sell its product at the wholesale level tax free. If the in-State manufacturer sells West

Virginia manufactured products at the retail level, or any other person sells those products at wholesale, such sales are subject to taxation. Thus, the only time that a wholesale sale of West Virginia manufactured products goes tax free is when it is sold by a manufacturer who has paid tax on the manufacturing privilege at a much higher rate. This is an entirely reasonable system of taxation of the manufacture and sale of products in West Virginia that does not discriminate against interstate commerce.

This Court has upheld similar systems of state taxation. In Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941), the tax complained of there was an annual license tax of One Hundred Dollars ($100.00) imposed for each vehicle used in the business of peddling

goods or merchandise. The license tax did not apply to local manufacturers that paid a tax on their capital or local distributors having a fixed place of business in the state who paid a state tax on their purchases. Thus, the practical effect of the statute was that the vehicles of local manufacturers and distributors were exempt from the license tax, while the vehicles of vendors domiciled out of state were subject to the tax. The appellant in the case was a West Virginia bakery that sent its trucks into Virginia to sell bakery goods. This Court held the license tax to be constitutional, upon a finding that the tax in question was but one portion of a reasonable comprehensive scheme of taxation. Also, the Court held that while local manufacturers and distributors were not subject to the tax

on their vehicles, they paid other state taxes which the state deemed sufficient to cover all of their activities, including the vending of goods. The Court in its decision also noted if the license tax was not allowed, the out-of-state vendors would be the only vendors in Virginia to escape some form of taxation.

Likewise, in the case of Alaska v. Arctic Maid, 366 U.S. 199 (1961), cited by the lower court, the tax involved was a 4 percent occupation tax on freezer ships processing fish taken from Alaskan waters. The taxpayer there used freezer ships for the taking and preservation of salmon along Alaska's shores. After freezing the fish, the freezer ship would return to the State of Washington where the fish were canned. The taxpayer claimed discrimination, since fish

that were caught and canned in Alaska were not subject to the 4 percent tax. This Court looked at Alaska's entire scheme of taxation and upheld the tax, saying:

> "It is claimed that there was no tax on salmon caught and frozen in Alaska and destined for canning in Alaska and that therefore this law is discriminatory against freezer ships. Alaskan canneries, however, paid a six-percent tax on the value of salmon obtained for canning; and local fish processors, which sell to the fresh-frozen consumer market, paid a one-percent tax. The freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaskan canners; and we know from the record that fish canned locally usually are not frozen. When we look at the tax laid on local canners and those laid on 'freezer ships,' there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed,

> it did not exceed the six-percent tax on the local canners. * * * If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (International Harvester Co. v. Evatt, 329 US 416, 422, 91 L Ed 390, 395, 67 S Ct 435) as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary." (Citations omitted.) 366 U.S. at 204 - 205.

See also, Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932).

Accordingly, although in-State manufacturers do not pay under the wholesale sales classification of the business and occupation tax, they nevertheless must pay a tax, at a much higher rate, on the entire manufacturing privilege. Given the tax burden placed on the in-State manufacturer, it cannot be

said that appellant pays a disproportionate amount of tax on its in-State sales.

The exact issue presented in this case has been previously presented to this Court in Columbia Gas Transmission Corporation v. Herschel H. Rose, III, Tax Commissioner of West Virginia, 103 S. Ct. 32 (1982). In that case, the identical interplay of the statutes at issue was challenged. The fifth paragraph of Code 11-13-2 exempts from the payment of the State's wholesale sales privilege tax not only those selling products whose manufacture was subject to the State's manufacturing privilege tax but also the sale of natural resource products whose production was subject to the State's production privilege tax. Columbia Gas as an out-of-State producer of natural gas, claimed

that the taxation of its in-State wholesale sales, in light of the exemption accorded in-State producers, acted as a discrimination against interstate commerce. This Court's dismissal of the Columbia Gas appeal should serve as controlling precedent in this case.

CONCLUSION

Counsel for the appellee, David C. Hardesty, Jr., West Virginia State Tax Commissioner, respectfully submits that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate non-federal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

ROBERT DIGGES, JR.
ASSISTANT ATTORNEY GENERAL
for the State of West Virginia
State Capitol, W-435
Charleston, West Virginia 25305

Counsel for Appellee
Herschel H. Rose, III

Of Counsel

CHAUNCEY H. BROWNING
Attorney GEneral

JACK C. McCLUNG
Deputy Attorney General

State Capitol
Charleston, West Virginia
25305